

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ALPHONSO NICKERSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. No. 03-536-SLR
	)	
THOMAS L. CARROLL,	)	
Warden, and ATTORNEY	)	
GENERAL OF THE STATE	)	
OF DELAWARE,	)	
	)	
Respondents.	)	

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Alphonso Nickerson. Pro se petitioner.

Loren C. Meyers, Chief of Appeals Division, Delaware Department  
of Justice, Wilmington, Delaware. Counsel for respondents.

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**MEMORANDUM OPINION**

September 27, 2004  
Wilmington, Delaware

**ROBINSON**, Chief Judge

## **I. INTRODUCTION**

Petitioner Alphonso Nickerson is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court will dismiss petitioner's application as time-barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1).

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In 1997, petitioner was charged by information with first degree burglary, possession of a deadly weapon during the commission of a felony, aggravated menacing, and third degree assault. A superseding indictment charged petitioner with first degree burglary, possession of a deadly weapon during the commission of a felony, aggravated menacing, and second degree assault. A Delaware Superior Court jury convicted him of first degree criminal trespass as a lesser included offense of first degree burglary, the weapons offense, aggravated menacing, and third degree assault as a lesser included offense of second degree assault. On March 7, 1998, the Superior Court sentenced petitioner as an habitual criminal to a total of 27 years imprisonment, suspended after a total of 25 years imprisonment for 2 years probation. (D.I. 9; D.I. 12, State's Mot. to Affirm

in Nickerson v. State, No.54,2003 at 1-2)

On direct appeal, petitioner alleged that his deadly weapon conviction and his consequential sentence as an habitual criminal violated his federal and state constitutional due process rights. (D.I. 12, State's Ans. Br. in Nickerson v. State, No.132,1998 at 7-8) The Delaware Supreme Court affirmed petitioner's convictions. Nickerson v. State, 734 A.2d 159 (Del. 1999). Petitioner applied for a state writ of habeas corpus on December 29, 1999, which the Superior Court summarily denied the next day. Petitioner appealed, and the Delaware Supreme Court affirmed this denial on March 27, 2000. Nickerson v. State, 750 A.2d 530 (Del. 2000).

On March 18, 2002, petitioner filed a motion for state post-conviction relief pursuant to Delaware Superior Court Criminal Rule 61. He raised four claims: (1) the trial court erred in not conducting a hearing on his motion to dismiss his counsel; and (2) three claims for ineffective assistance of counsel. In October 2002, a Superior Court Commissioner recommended denial of the Rule 61 motion, and the Superior Court adopted this Recommendation on January 28, 2003. Petitioner appealed, and the Delaware Supreme Court affirmed the Superior Court's decision. Nickerson v. State, 823 A.2d 491 (Del. 2003).

Petitioner, acting pro se, filed the pending application for federal habeas relief on June 3, 2003. (D.I 2) He alleges: (1)

he was acquitted of the felony underlying the weapons offense, thus, he could not be convicted of the weapons offense; (2) his weapons conviction violated his state and federal constitutional due process rights; (3) three claims of ineffective assistance of counsel; and (4) the Superior Court erred in failing to conduct a hearing on his request that his trial counsel be discharged.

(D.I. 2)

The State correctly asserts that petitioner has exhausted state remedies. However, the State contends that the entire petition is time-barred and asks the court to dismiss the petition as untimely.

Petitioner's § 2254 petition is ready for review.

### **III. DISCUSSION**

#### **A. One-Year Statute of Limitation**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") prescribes a one-year period of limitation for the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). The one-year limitation period begins to run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner does not allege, nor can the court discern, any facts triggering the application of § 2244(d)(1)(B), (C), or (D). As such, the one-year period of limitation began to run when petitioner's conviction became final under § 2244(d)(1)(A).

If a state prisoner appeals a state court judgment but does not seek certiorari review, the judgment of conviction becomes final, and the one-year period begins to run, upon expiration of the ninety-day time period allowed for seeking certiorari review.

See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir.

1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

In the present case, the Delaware Supreme Court affirmed petitioner's conviction and sentence on March 11, 1999.

Nickerson v. State, 734 A.2d 159 (Del. 1999). Petitioner did not apply for certiorari review, thus, his conviction became final on June 9, 1999. See Kapral, 166 F.3d at 575, 578 (3d Cir. 1999).

Accordingly, to comply with the one-year limitations period, petitioner had to file his § 2254 petition by June 9, 2000.

A pro se prisoner's habeas petition is deemed filed on the date he delivers it to prison officials for mailing to the

district court. See Longenette v. Krusing, 322 F.3d 758, 761 (3d Cir. 2003); Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Woods v. Kearney, 215 F. Supp. 2d 458, 460 (D. Del. 2002).

Petitioner's habeas application is dated May 30, 2003, and presumably, he could not have delivered it to prison officials for mailing any earlier than that date. See, e.g., Gholdson v. Snyder, 2001 WL 657722, at \*2 n.1 (D. Del. May 9, 2001).

Consequently, the court adopts May 30, 2003 as the filing date, which is well past the expiration of AEDPA's limitations period. Thus, unless the limitations period can be statutorily or equitably tolled, petitioner's habeas petition is time-barred. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The court will discuss each doctrine in turn.

### **B. Statutory Tolling**

Section 2244(d)(2) of the AEDPA specifically permits the statutory tolling of the one-year period of limitations:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending should not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). The Third Circuit views a properly filed application for State post-conviction review as "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). However, even if a state post-

conviction motion is properly filed under state procedural rules, it will not toll or revive the federal habeas limitations period if the state post-conviction motion itself is not filed within the federal one-year filing period. See Price v. Taylor, 2002 WL 31107363, at \*2 (D. Del. Sept. 23, 2002).

Here, petitioner properly filed a petition for state habeas relief on December 29, 1999, and the Delaware Superior Court summarily dismissed it on December 30, 1999. Petitioner appealed, and the Delaware Supreme Court affirmed the Superior Court's denial on March 27, 2000. Nickerson v. State, 750 A.2d 530 (Del. 2000). Consequently, the limitations period was tolled from December 29, 1999 through March 27, 2000. See 28 U.S.C. § 2244(d)(2); Carey v. Saffold, 536 U.S. 219, 221 (2002) (application for state collateral review tolls time period for seeking federal habeas corpus remedy during the time between a lower state court's decision and the filing of a notice of appeal in a higher state court, and it continues to toll the time period until there is a final resolution). However, when petitioner filed his petition for state habeas relief on December 29, 1999, 203 days of the limitations period had expired. As such, to be timely, petitioner had to file his habeas petition by September 5, 2000. Petitioner's § 2254 petition, filed on May 30, 2003,

was too late.<sup>1</sup> Thus, petitioner's habeas application is time-barred unless the one-year time period is equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

### **C. Equitable Tolling**

A court may, in its discretion, equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." Miller v. New Jersey State Dep't of Corrs., 145 F.3d 616 (3d Cir. 1998) (internal citations omitted). In general, federal courts invoke the doctrine of equitable tolling "only sparingly." See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). The Third Circuit permits equitable tolling for habeas petitions in only three narrow circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights; or
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." Id. (quoting Midgley, 142 F.3d at 179).

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<sup>1</sup>Petitioner also filed a Rule 61 motion for post-conviction relief on March 18, 2002. However, this motion does not have any tolling effect because it was filed approximately one and half years after the expiration of AEDPA's limitations period. See Price, 2002 WL 31107363, at \*2.



In order to trigger equitable tolling, the petitioner must demonstrate that he “exercised reasonable diligence in investigating and bringing [the] claims”; mere excusable neglect is insufficient. Miller, 145 F.3d at 618-19 (citations omitted). For example, in non-capital cases, inadequate research, attorney error, miscalculation, or other mistakes do not qualify as “extraordinary circumstances” sufficient to trigger equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

In the present case, petitioner has failed to articulate any extraordinary circumstances that prevented him from filing his petition with this court in a timely manner. The court has independently reviewed the record and can discern no extraordinary circumstances that warrant equitable tolling. To the extent petitioner made a mistake or miscalculation regarding the one-year filing period, such mistakes do not warrant equitably tolling the limitations period. See Simpson v. Snyder, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002). Accordingly, the court will dismiss petitioner’s § 2254 application as untimely.

#### **IV. CERTIFICATE OF APPEALABILITY**

Finally, the court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a “substantial showing of the denial of a constitutional right” by demonstrating “that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Id. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." Id.

The court concludes that petitioner's habeas petition must be dismissed as untimely. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

## **V. CONCLUSION**

For the reasons stated, petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.